

## Terminating Employees For Theft, Part 2

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In our last issue (*Retail Update*, March 2011) we looked at some ideas about how to investigate, catch, and terminate employees who are stealing from the company. In this conclusion, we'll talk about some ways to avoid – or at least lessen the possibility of – getting sued.

### Admissions

If an employee admits to the theft, ask for a written confession. As with witness statements, this should be in the employee's own handwriting. Managers should also be taught that the "Law and Order" hot-boxing method of extracting confessions could easily backfire. If the circumstances under which the employee gives the confession can be characterized as coerced, a jury may choose to ignore it. To this end, allow an employee to leave the interview and go to another area where the investigators are not hovering around the document that is being prepared.

If the employee refuses to admit theft even where there is indisputable evidence of guilt, you must choose carefully how to characterize the termination. Employees who refuse to admit guilt in the face of overwhelming evidence will continue to fight the assertion of theft at every opportunity. These are the individuals most likely to sue.

Once you submit "theft" as the reason for termination to an unemployment compensation board, the battle will be on. It may well be a battle worth fighting, but that decision must be made in light of all the potential claims an employee may have, not just the unemployment compensation claims.

## **Police Involvement**

For years, many managers and owners have believed that a good theft deterrent is to have the police arrest a suspect at the store and parade him out in handcuffs in front of all the other employees. While this might or might not be true, it is certainly one of the best methods of instigating a lawsuit.

Before calling the police, it is critical to know how seriously they will respond to allegations of theft of a few hundred dollars in merchandise. Some police departments are simply too overwhelmed with violent crimes to do more than write a report of the complaint. Either a lack of interest or sloppy handling of the matter by the police can both be used to undercut the employer's claims against the employee. Ultimately, no police involvement is better than limited or poorly handled police involvement.

If a police department is ready, willing, and able to respond to reports of theft, call them in when you discover missing items or money. In such a situation, it is critical that whoever interfaces with the police does not point the finger at the suspected employee. If a different employee turns out to be involved, this can initiate a claim for malicious prosecution under many states' laws. Should the suspect beat the charges, which sometimes occurs, an employee will be more likely to succeed on a claim for malicious prosecution.

If the police press charges against the employee, you must be willing to provide all the assistance the police require. Witnesses failing to appear for trial will result in charges being dropped and will cast doubt on the employer's good faith.

## **Follow Through**

Another area that often surfaces as a pitfall in employment litigation arising out of employee theft is the failure of the company to recognize that the departure of the employee is not the last that they will hear of it. Organize and store the records of the investigation for future use. Nothing should be allowed to be destroyed. If business records that are ordinarily disposed of are used, they should not be put back where they came from. Video footage of an employee pocketing a twenty is solid gold in a court. Not having the video footage of the employee pocketing the twenty in an employment trial is solid gold for the plaintiff. No explanation will overcome a jury's assumption that if the video is missing, the employer did not want them to see the video

## **The Unemployment Compensation Hearing**

Treating the almost inevitable unemployment compensation claim lightly can wreak havoc on later proceedings related to the termination. If the employee already has counsel, that attorney will likely attend the hearing and question witnesses. Testimony is under oath and in some cases, that testimony can be used against the company in later proceedings. Yet rarely do employers take any time to prepare witnesses for these hearings.

Another problem is that witnesses are often no longer employed by the time of the hearing. While they can be subpoenaed, many employers fail to take this step counting on the statements taken during the investigation to carry the day. The problem is that while the statements are often admissible, the court might not be able to credit hearsay statements over the first hand accounts of the employee.

When an employer loses the unemployment compensation claim, the employee becomes emboldened to assert other claims. Additionally, the loss at the unemployment hearing can create factual issues over whether the qualified privilege applies as a defense to a defamation claim for statements accusing the employee of malfeasance. If you do not want to spend the time, energy, and effort needed to fully prepare for the unemployment compensation claim, it may well be better not contesting the claim at all.

### **Conclusion**

While retailers can take strong efforts to reduce employee theft, eliminating it entirely is likely an impossibility. But employers do have the ability to greatly diminish the opportunity for the insult of an expensive lawsuit being added to the injury of theft.

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